

DELAWARE STATE BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL ETHICS

Opinion 1982 - 2

FACTUAL BACKGROUND

The inquiry has been made as to the propriety of a listing, on an attorney's business card, an investigator hired by the attorney and working under his direction. The facts as presented state that the attorney will be utilizing on a part-time basis the services of an investigator, who will not work for any other law firms within this State. The inquiry does not state whether or not he would be working for attorneys in other states, or in any other capacity. The form of the suggested business card is as follows:

(302) 666-1234

JOHN E. SMITH  
Attorney at Law

Tom S. Jones  
Investigator

123 First Street  
Wilmington, DE 19801

DISCUSSION

It is important to understand that an investigator may, in himself, be a "professional" and regulated by Delaware Law as a private detective, 24 Del.C. §1301 et seq. Therefore, it becomes crucial to determine at the outset the nature and extent of the relationship between the inquiring attorney, and the individual whom he

hopes to employ. It has been recognized by this Ethics Committee that separate professions may share office space, and otherwise act within the confines of the same building, as long as there is a complete separation of identities, DSBA Opinion 1979-3. However, for the purposes of this Opinion, it will be assumed that the person sought to designated on the attorney's card is being hired only on a "as needed basis".

It has been recognized by the ABA Code of Professional Responsibility, Ethical Considerations, that attorneys will often delegate nonlegal tasks to lay persons, EC 3-6. ABA Informal Opinion 1367 permits, and notes other local Bar Association Opinions permitting nonlawyers to sign their names on a law firm's stationery, as long as care is used to designate that they themselves are not attorneys and that:

"... care should be taken to identify accurately the capacity the person who signs the letter so that the receiver is not misled."

It is also permissible to identify a "legal assistant" on a business card, ABA Informal Opinion 1185.

Considering the present issue, the American Bar Association has considered the question presented by the inquiring attorney with regards to full-time staff investigators. In ABA Informal Opinion 909, May 7, 1966, the Committee recognized the increasing use of investigators. There, an investigator was permitted to use a

a card showing his association with the law firm with several caveats. First, it was stated that the law firm was ultimately responsible for the investigator's conduct, and it was improper for the investigator to conduct himself in any manner in which it would be unethical for a lawyer to act. The supervising lawyer had the full responsibility for the actions of the investigator. Further, the investigator was not permitted to investigate or to become involved in any matter that the law firm itself was not already retained to handle, and thus, there could be no solicitation by the investigator. Again, the firm, or supervising lawyer bore full responsibility for the investigator's actions. The business card could be displayed only to persons being interviewed and not generally used for distribution purposes. Finally, the form of the card approved in that Opinion required that the investigator's name must be the prominent name shown on the card so that those persons receiving the card would not be misled into believing that the person displaying it was in fact an attorney. The form approved was as follows:

(302) 666-1234

TOM S. JONES  
Investigator

John E. Smith  
Attorney at Law

123 First Street  
Wilmington, DE 19801

By comparison in ABA Informal Opinion 1000, it stated that an investigator may not be listed on a law firm's letterhead.

Part of the concerns contained in ABA Informal Opinion 909 was that the cards not be used for advertising purposes. However, that decision was rendered by the Committee prior to the decision in the United States Supreme Court in Bates v. State Bar Association of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d. 810 (1977), which stated that attorneys had a constitutional right to advertise. ABA Informal Opinion 1437, April 2, 1979, seems to take into consideration the ruling of Bates. That Opinion permitted a former social worker, now attorney, to advertise specialization in divorce law, in conjunction with the use of his wife, as a clinical social worker. However, the Committee there admonished that there must, under DR3-101A be strict control to assure that the nonlawyer did not practice law. Under DR3-102A, there could be no sharing of fees with the nonlawyer. Finally, under DR3-103A, no form of partnership with the nonlawyer would be permitted.

DR2-102A(1) sets the limits for use of business cards by lawyers. However, the rule is silent on the question presented here. Where other local bar associations have reviewed the problem, there is a split of authority. Arizona Op. 74-37 (12/18/74); Columbus Ohio Bar Op. (11/6/74); 63 Ill. B.J. 43, Op. 449 (6/3/74); Minn. Op. 8 (6/24/74); N.Y.C.B.A. Op. 505 (4/8/74) permit lay persons working directly under an attorney's

supervision to identify themselves with business cards showing a relationship to a law firm. L.A.Co. Op. 346 (3/20/75); Fla. Op. 73-43 (4/30/73); N.J. Op. 296 (1975); and Org. Op. 238 (3/8/73) disapprove of such a practice. In light of the ABA ruling, ABA Informal Opinion 1185, the constraints as set out in ABA Informal Opinion 1437, and the ruling of Bates v. State Bar Association of Arizona, supra, such a carefully controlled business card would not seem to be unethical per se.

#### CONCLUSION

The inquiring attorney, if he uses exclusively the services of an investigator, may allow the investigator to indicate on the investigator's "calling card" that the investigator is associated with the attorney. This is contrasted to the attorney's card indicating an association with an investigator. In addition, the attorney so employing an investigator bears full and complete responsibility for the investigator's action, and the investigator's actions must at all times comply with the ethical constraints upon the employing attorney. The problem in the situation presented by the inquiring attorney, and left unknown, is the other potential employment by the investigator. If the investigator performs services for other non-Delaware lawyers, or otherwise provides "private detective" services, within the meaning of 24 Del.C. §1302, of which the inquiring attorney does not provide direct and controlling

supervision, then the indication of association between the inquiring attorney employs the investigator on an exclusive basis, even though only part-time, and if the business card identifies the investigator showing an association with an attorney, rather than appearing to identify the attorney, then the use of such a business card would be proper. The purpose of the "exclusivity" requirement is to insure that the public at large is not misled, and to make clear that the investigator is working solely as the agent or employee of the attorney in question. If there is no such "exclusivity" then it must be presumed that the investigator is employed as an independent contractor, and may not be identified with the attorney.

This Opinion has been rendered after considering the present Delaware Code of Professional Responsibility, as well as Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, ABA Proposed Model Rules of Professional Conduct.

Dated: February 1, 1982